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No. 277

In the Supreme Court of the United States

OCTOBER TERM, 1969

KENNETH WAYNE KNAACK AND MILTON SEGOVIANO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1–15) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on April 11, 1969. A petition for rehearing was denied on May 14, 1969. The time to file a petition for a writ of certiorari was extended to June 23, 1969, and again to June 26, 1969. The petition was filed on June 24, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

358-009—69

QUESTIONS PRESENTED

1. Whether the trial court's questioning of witnesses deprived petitioners of a fair trial.

2. Whether the government was properly permitted to cross-examine petitioner Segoviano concerning the circumstances of his resignation from the police force.

3. Whether there was error in the instructions to the jury.

4. Whether it was error to give a charge based on *Allen v. United States*, 164 U.S. 492.

STATEMENT

Petitioners were convicted by a jury in the United States District Court for the Northern District of Illinois of burglary of a federally insured bank, in violation of 18 U.S.C. 2113 (Pet. App. 1).

Petitioner Knaack was sentenced to twelve years' imprisonment, and petitioner Segoviano to fifteen years' imprisonment (Pet. 1). The court of appeals affirmed (Pet. App.)

The government's evidence at trial showed that at about midnight on April 21, 1966, the Chicago Heights National Bank's alarm sounded in the Chicago Heights Police Department, and a call was issued on the police radio (A. 31, 115).[1] Officer LaFaive and Sgt. Hogeveen were the first to reach the scene (A. 32). Officer LaFaive looked through the front door and saw a man running up a stairway inside the bank (A. 31). He reported to Sgt. Hogeveen that someone was inside, and Sgt. Hogeveen radioed for help (A. 31, 116).

[1] "A." refers to Defendants-Appellants' Joint Appendix in the court of appeals.

Hogeveen then ran to the back of the bank and saw two men standing below an open fire escape door on the second floor (A. 116). Hogeveen gave chase as the two men, later discovered to be petitioners, fled towards a railroad right-of-way behind the bank. Additional police officers arrived and assisted Sgt. Hogeveen in arresting the men (A. 40–43, 69–70, 116–119). Hogeveen testified that he had petitioners under continual observation from the time he first saw them at the bank until their arrest. When he approached the men, he recognized petitioner Segoviano, who formerly had been a police officer (A. 118, 122). At the time of their arrest, petitioners had firearms and burglary tools in their possession (A. 70, 98).

Both petitioners testified at trial that they had been in the vicinity of the bank at the time of the burglary, but that they had not been together (A. 146–149, 204–209). Each of them testified that when he saw all the police in the area he went to see what was happening and was merely a spectator when he was arrested (A. 147–149, 206–207). Segoviano stated on direct examination that he had once been employed as a police officer and that he had resigned and taken another job (A. 145). Over counsel's objection, Segoviano was asked on cross-examination about the circumstances of his resignation, and he replied that the resignation was requested by his superiors after he had been arrested for robbery but that the charge had later been dismissed (A. 150–153). The trial court instructed the jury that this testimony could be considered, if the jury thought it relevant, only on the question of Segoviano's credibility as a witness and that

it had no bearing on his guilt or innocence on the present charge (A. 152–153, 304–305).

ARGUMENT

1. The court below correctly rejected petitioners' claim that the trial judge's practice of questioning witnesses deprived them of a fair trial. A trial judge does not abuse his discretion in asking questions when he believes that some part of the testimony had been left unclear. *Ray* v. *United States*, 367 F. 2d 258, 261 (C.A. 8), certiorari denied, 386 U.S. 913; *Dranow* v. *United States*, 307 F. 2d 545, 572 (C.A. 8); *Daley* v. *United States*, 231 F. 2d 123, 130 (C.A. 1), certiorari denied, 351 U.S. 964. The trial judge here was completely neutral, asking questions of both government and defense witnesses. Moreover, he specifically instructed the jury that the mere fact that he had asked the questions gave them no special significance and that the responses to his questions were to be given the same weight as the evidence elicited by counsel (A. 303–304).

2. Petitioner Segoviano contends that the district judge erred in allowing the government to cross-examine him with respect to the circumstances surrounding his resignation from the police force. As the court of appeals held, however, the government's cross-examination was proper since it was necessary to correct the erroneous impression arising from Segoviano's direct testimony that he had voluntarily resigned in order to take a better job. The trial court emphasized to the jury that the evidence went only to the question of Segoviano's credibility, if the jury

thought it relevant to that point, and not to the issue of guilt. In these circumstances there was no ground for reversal. *United States* v. *Lowe,* 234 F. 2d 919 (C.A. 3), certiorari denied, 352 U.S. 838; cf. *United States* v. *Fiorillo,* 376 F. 2d 180, 186 (C.A. 2); *United States* v. *Coduto,* 284 F. 2d 464 (C.A. 7), certiorari denied, 365 U.S. 881; *Segal* v. *United States,* 246 F. 2d 814 (C.A. 8), certiorari denied, 355 U.S. 894.

3. Petitioners object to the trial court's instructions to the jury that all witnesses are presumed to tell the truth until this presumption is outweighed by any of several possible considerations, which the judge then outlined (A. 298–302). This instruction operated neutrally, since it applied to the defense witnesses, including both petitioners, as well as to the government witnesses. Furthermore, the trial judge carefully instructed the jury with respect to determining the credibility of witnesses and the government's burden of proof (A. 299–301). The government's burden of proof was in no way diminished by the challenged instruction. See *United States* v. *Bilotti,* 380 F. 2d 649, 656 (C.A. 2), certiorari denied, 389 U.S. 944; *United States* v. *Quinn,* 398 F. 2d 298 (C.A. 7), certiorari denied, 393 U.S. 983.

4. After several hours of deliberation lasting into the evening, the jury was unable to reach a verdict. Prior to dismissing the jury for the night, the district judge gave an instruction which was similar to that approved in *Allen* v. *United States,* 164 U.S. 492 (A. 323–326). The next day, after two additional hours of deliberation, the jury returned the guilty verdicts (A. 327). The court of appeals correctly held

that the *Allen*-type instruction did not mislead or coerce any juror into a verdict in which he did not conscientiously concur. See *Hyde* v. *United States*, 225 U.S. 347; *Andrews* v. *United States*, 309 F. 2d 127 (C.A. 5); *United States* v. *Barnhill*, 305 F. 2d 164 (C.A. 6), certiorari denied, 371 U.S. 865; *Huffman* v. *United States*, 297 F. 2d 754 (C.A. 5); *United States* v. *Thomas*, 282 F. 2d 191 (C.A. 2); *Kawakita* v. *United States*, 190 F. 2d 506 (C.A. 9), affirmed, 343 U.S. 717. The judge pointed out that juries who deliberate late into the night tend to become emotionally involved, and he urged the jurors to resume the next morning calmly and dispassionately to reexamine the facts. The instruction essentially asked each juror to be willing to reexamine the premises of his position, and listen to the arguments. It made clear that in the final disposition, the conscience of each juror must govern.[2]

[2] Petitioner contends that the comment in the supplemental instruction that the jury should determine "what the evidence in light of my instructions, indicates should be [the] verdict" had the effect of diminishing the government's burden of proof. However, the instructions referred to by the judge included an appropriate charge on the burden of proof beyond a reasonable doubt (A. 295–296), and on two subsequent occasions in the *Allen* charge, the trial judge specifically used the language "guilt beyond a reasonable doubt" (A. 325).

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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